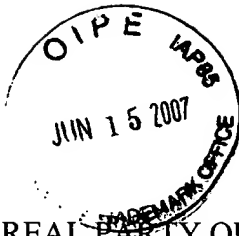




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Docket No.: 125273.00007

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PATENT

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

|             |                                                                                                             |   |                                 |
|-------------|-------------------------------------------------------------------------------------------------------------|---|---------------------------------|
| In re:      | Patent Application of Crain et al.                                                                          | : | Group Art Unit: 2174            |
| Appln. No.: | 09/812,405                                                                                                  | : | Examiner: Ke, Peng              |
| Filed:      | March 19, 2001                                                                                              | : |                                 |
| For:        | METHODS AND DEVICES FOR RECORDING CHANGES IN<br>VISUAL STIMULI OBSERVED THROUGH BROWSER-BASED<br>INTERFACES | : | Attorney Docket<br>125273.00007 |

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

**APPELLANT'S BRIEF (37 C.F.R. 4 1.37)**

This brief is in furtherance of the Notice of Appeal, filed in this case on March 9, 2007 and received by the U.S. Patent and Trademark Office on March 12, 2007.

The fees required under §1.17(c), and any required petition for extension of time for filing this brief and related fees are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

The final page of this brief bears the practitioner's signature.

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**I. REAL PARTY OF INTEREST (37 C.F.R. § 41.37(c)(1))**

The real party in interest in this appeal is Schlucktronix LLC by virtue of an assignment from the inventors to Xeno Development, Inc., recorded at Reel 011639, Frame 0757 on March 19, 2001, and an assignment from Xeno Development, Inc. to Schlucktronix LLC, recorded at Reel 018667, Frame 0519 on December 21, 2006.

## **II. RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 41.37(c)(2))**

There are no such appeals or interferences.

### **III. STATUS OF CLAIMS (37 C.F.R. § 41.37(c)(3))**

The status of the claims in this application are:

#### **A. TOTAL NUMBER OF CLAIMS IN APPLICATION**

Claims in the application are: 19 claims. (Claims 1-15 and 18-21)

Claims currently pending in the application: 19 pending claims

#### **B. STATUS OF ALL THE CLAIMS**

1. Claims cancelled: 16-17
2. Claims withdrawn from consideration but not cancelled: NONE
3. Claims pending: 1-15 and 18-21
4. Claims allowed: NONE.
5. Claims rejected: 1-15 and 18-21

#### **C. CLAIMS ON APPEAL**

The claims on appeal are: 1-15 and 18-21

#### **IV. STATUS OF AMENDMENTS (37 C.F.R. § 41.37(c)(4))**

The claims presently pending are those submitted June 29, 2006 in response to the non-final Office Action mailed April 20, 2006.

## **V. SUMMARY OF THE CLAIMED SUBJECT MATTER (37 C.F.R. § 41.37(c)(5))**

The following summary is provided without any intention to limit the scope of the claims.

Claim 1 includes a system that enables a reconstructing of user-viewable visual stimuli. By way of example and not by limitation, see, e.g., Figure 1, browser-interface architecture 100 and the accompanying description at page 13, lines 5-28 of the specification. A processing platform is provided for executing code capable of recording a user-viewable visual stimuli, verifying a change in the visual stimuli without requiring user specified information as an input, and creating a visual event as a result of a browser event that causes a change in the visual stimuli. By way of example and not by limitation, see, e.g., Figure 1, computer 110 and the accompanying description at page 13, lines 5-28 of the specification. A storage platform is provided for storing at least the visual stimuli, wherein the storage platform is operably coupled to the processing platform. By way of example and not by limitation, see, e.g., Figure 1, host computer 130 and the accompanying description at page 13, lines 5-28 of the specification. The processing platform is adapted to reconstruct at least one of the visual stimuli and the change in the visual stimuli, at a specific time that a user viewed the visual stimuli. By way of example and not by limitation, see, e.g., Figure 1, computer 110 and the accompanying description at page 13, lines 5-28 of the specification.

Claim 13 includes a system that enables a reconstructing of user-viewable visual stimuli. By way of example and not by limitation, see, e.g., Figure 1, browser-interface architecture 100 and the accompanying description at page 13, lines 5-28 of the specification. A processing platform is provided for executing code capable of recording a user-viewable visual stimuli, verifying a change in the visual stimuli, verifying a change in a user's eye position, and creating



a visual event as a result of a browser event that causes the change in the visual stimuli and to the change in the user's eye position with respect to a portion of the visual stimuli. By way of example and not by limitation, see, e.g., Figure 1, computer 110 and the accompanying description at page 13, lines 5-28 of the specification. A storage platform is provided for storing at least the visual stimuli, wherein the storage platform is operably coupled to the processing platform. By way of example and not by limitation, see, e.g., Figure 1, host computer 130 and the accompanying description at page 13, lines 5-28 of the specification. The processing platform is adapted to visually reconstruct and display the change in the visual stimuli in association with the change in the user's eye position with respect to a portion of the visual stimuli, at a specific time that a user viewed the visual stimuli. By way of example and not by limitation, see, e.g., Figure 1, computer 110 and the accompanying description at page 13, lines 5-28 of the specification.

Claim 21 includes a computer readable medium comprising instructions for correlating an eye position with a portion of the displayed visual stimuli (by way of example and not by limitation, see, e.g., page 5, lines 10-20 of the specification and Figure 2 at 210-240 and the accompanying description at page 14, lines 1-12 of the specification), verifying a change in the displayed visual stimuli resulting from a browser event that causes the change (by way of example and not by limitation, see, e.g., Figure 2 at 210-240 and the accompanying description at page 14, lines 1-12 of the specification), verifying a change in the eye position based on the change in the displayed visual stimuli (by way of example and not by limitation, see, e.g., Figure 2 at 210-240 and the accompanying description at page 14, lines 1-12 of the specification), and reconstructing the change in the displayed visual stimuli and the change in the eye position, at a specific time that a user viewed at least one of the displayed visual stimuli at an eye position, the

change in the displayed visual stimuli, the change in the eye position and the change in the eye position based on the change in the displayed visual stimuli (by way of example and not by limitation, see, e.g., Figure 2 at 210-240 and the accompanying description at page 14, lines 1-12 of the specification).

**VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**  
**((37 C.F.R. § 41.37(c)(6))**

1. Whether claims 1-15 and 18-21 are unpatentable under 35 U.S.C. 103(a) over Rapaport in view of Ezekiel

## VII. ARGUMENTS ((37 C.F.R. § 41.37 (c)(7))

**1. Rapaport in view of Ezekiel fails to provide a prima facie basis for the rejection of claims 1-15 and 18-21 under 35 U.S.C. 103(a), because they fail to disclose each element of the claimed invention.**

The Examiner has incorrectly construed the claims in rejecting all pending claims over Rapaport in view of Ezekiel, and has failed to provide a prima facie basis for the rejection of the claims under either the improper construction adopted by the Examiner or the proper construction of the claims. Claim construction is a question of law, and is reviewed *de novo*. *Markman v. Westview*, 52 F. 3d 967, 34 USPQ2d 1321 (Fed. Cir. 1995), *aff'd* 116 S.Ct. 1384 (1996).

Consider claim 1, which includes “verifying a change in the visual stimuli without requiring user specified information as an input.” In the final Office action mailed November 11, 2006, the Examiner states at page 2 that “the examiner interprets determining whether a scroll bar is depressed as verifying a change in visual stimuli,” citing to Rapaport at col. 12, lines 33-37. However, as Rapaport discloses at col. 12, lines 33-37 that “Control is then transferred to logic block 354 to determine if the media file segment is of interest to the user by analyzing the rate of media progression, such as whether a scroll bar is being depressed or if the media file segment is printed, saved or listened to.” The user would be performing all of these actions, and all of these actions require user specified information as an input. For example, depressing a scroll bar is user-specified input – a scroll bar can not depress itself, and when the user depresses the scroll bar, they are providing user specified information. Likewise, selection of a media file segment for printing, saving or listening to is performed by a user, and the user is providing user

specified information when they do so. Furthermore, even if determining whether a media file is being listened to might not require user input if the media file is automatically played, the claim element in question recites “verifying a change in the *visual* stimuli without requiring user specified information as an input.” Not only is passive listening to a media file that is automatically played not a change in stimuli, it is certainly not a change in *visual* stimuli.

The Examiner further states at page 3 of the final Office action that “[s]ensing changes in eye pupil diameter is neither an user specified information nor an examination of how the user is looking at the visual stimuli.” The Applicants are at a loss to understand what the Examiner is referring to, as the claim element in issue is “verifying a change in the visual stimuli without requiring user specified information as an input,” and not “examining how the user is looking at the visual stimuli.” In any event, equating visual stimuli to audio stimuli reads the limitation of “visual” out of the claim, and equating depressing a scroll bar, or saving or printing a file to actions that do not require user input reads limitations out of the claim. Federal Circuit precedent prohibits construing claims in a manner that reads elements out of the claim. *Texas Instruments v. U.S. Int’l Trade Comm’n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993). Not only is the Examiner’s construction of the claim term in issue improper, because it reads express limitations out of the claim, there is simply no construction of the claim term in issue that results in anticipation by Rapaport. Furthermore, Rapaport provides no teaching whereby the claim limitation would be obvious.

Many of the other claim constructions adopted by the Examiner are similarly incorrect. For example, at page 2 of the final Office action, the Examiner states in regard to the claim limitation “executing code capable of recording a user-viewable visual stimuli” that “the examiner interprets user-viewable stimuli to be any data viewable by the user.” The claim

limitation, however, is not “**generating** user-viewable visual stimuli,” but rather “**recording** a user-viewable visual stimuli.” The section of Rapaport cited by the Examiner reads, in pertinent part, “wherein the Personal Feedback browser provides a media file to the display.” Clearly, the media file being provided to the display does not involve a processor “executing code capable of recording a user-viewable visual stimuli.”

Likewise, the Examiner construes “creating a visual event relating to the change in the visual stimuli” at page 3 of the final Office action to be “changing the activation value of the profile relating to the media file.” However, that is not the claim term that is presented – instead, that claim term is “creating a visual event as a result of a browser event that causes a change in the visual stimuli.” Thus, the Examiner first changes the express wording of the claim term that is being examined from “creating a visual event as a result of a browser event that causes a change in the visual stimuli” to “creating a visual event relating to the change in the visual stimuli,” then equates the activation value of a profile relating to a media file to be the newly-crafted claim limitation. It is first noted that a change in an activation value of a profile is simply not a “visual event” – the activation value is data stored in the computer of Rapaport, and is simply not a visual event, much less “a visual event as a result of a browser event that causes a change in the visual stimuli.” In any event, it is clear from these examples that the Examiner finds the claim elements in Rapaport and Ezekiel only by misconstruing the claims to modify or eliminate limitations so as to then read the modified claim limitations on the prior art.

Additional examples of this improper claim construction can be found in regards to other claims. For example, in regards to claim 3, the Examiner at page 4 of the final Office action construes “detecting a visual event; verifying that the visual event involves a parameter that changes a viewable stimuli; and recording at least one parameter” to be “the user’s progression

through the media file segment is interpreted as the visual event, the rate of this progression is detected, analyzed and if there is a change the activation value parameter is changed and stored,” citing to Rapaport at col. 12, lines 26-40. However, as previously discussed, this section of Rapaport is discussing the rate of scrolling based on a user-entered depression of a scroll bar. As claim 3 depends from claim 1, the depression of the scroll bar by the user can not be the visual event, as the Examiner has already construed depression of the scroll bar to be “verifying a change in the visual stimuli without requiring user specified information as an input.”

The Examiner also explicitly applies the improper claim limitations discussed above to claims 13 and 21 in the manner discussed above.

It is worthy of note that Rapaport does disclose an eye tracking device that can be used to determine coordinate of eye gaze, pupil dilation, and head position orientation at col. 12, lines 43-50, and as such, a tangential relationship of the eye tracking device to the claimed invention could have been applied by the Examiner. However, what is not apparent is how this disclosure of Rapaport would relate to the claim limitations if such application had been made. Upon consideration of the Summary of the Invention of Rapaport, it is apparent why there is no relation.

According to an aspect of the present invention, a data processing apparatus for obtaining information from a computer network, such as the internet, is presented. The apparatus comprises: (a) a display for displaying data to a user; (b) input means for supplying input data in response to a user's input; (c) memory, coupled to the display and input means, for storing a Personal Feedback browser and a Personal Profile database; and, (d) a processor, coupled to the display, the input means and memory, for controlling the memory, input means, and the display in response to the stored Personal Feedback browser and the Personal Profile database, wherein the Personal Feedback browser provides a media file to the display based on the Personal Profile database.

Rapaport, col. 2, lines 27-40. As such, it is apparent why the eye tracking device of Rapaport is not relied on by the Examiner for certain claim limitations (other than claims 11-13 and 21, which explicitly call out an eye-tracking device) – because the eye-tracking device of Rapaport is only used for customization of a personal profile at the user’s web browser computer, and is not used to provide a system that enables a reconstructing of user-viewable visual stimuli. The claimed processing platform is for: executing code capable of recording a user-viewable visual stimuli, verifying a change in the visual stimuli without requiring user specified information as an input, and creating a visual event as a result of a browser event that causes a change in the visual stimuli, which is not used to create a personal profile that is used at a user’s web browser. Instead, it is used with a storage platform for storing at least the visual stimuli, wherein the storage platform is operably coupled to the processing platform; wherein the processing platform is adapted to reconstruct at least one of: the visual stimuli; and the change in the visual stimuli, at a specific time that a user viewed the visual stimuli. While the eye-tracking device of Rapaport can be used with a system that functions entirely at a user’s web browser to create a personal profile, it has no application to the claimed invention, and does not render the claimed invention obvious, either alone or in combination with other art.

The Examiner’s rejection of claim 13 is particularly pertinent in regards to the improper rejection of the claims. For example, claim 13 includes “a processing platform for: executing code capable of recording a user-viewable visual stimuli, verifying a change in the visual stimuli, verifying a change in a user’s eye position, and *creating a visual event as a result of a browser event that causes the change in the visual stimuli and to the change in the user’s eye position with respect to a portion of the visual stimuli.*” The Examiner fails to address the emphasized limitation as a whole, and instead first misconstrues the first part of that limitation (“creating a



visual event related to the change in the visual stimuli” instead of “creating a visual event as a result of a browser event that causes the change in the visual stimuli”) and rejects the misconstrued portion of the claim limitation over Rapaport at col. 12, lines 37-40, again stating that “the examiner interprets changing the activation value of the profile relating to the media file as creating a visual event relating to the change in visual stimuli,” final Office action at pages 6-7. The Examiner then separately construes the second part of the claim limitation (“and to the change in the user’s eye position with respect to a portion of the visual stimuli”) as being disclosed by Rapaport at col. 25, lines 30-35 and col. 12, lines 55-58. However, not only is it improper to re-write the claim limitation so as to read it on the cited art, it is also improper to break up the claim limitation into two separate parts where the limitation does not allow that (the claim recites creating a visual event as a result of a browser event that causes the change in the visual stimuli **and** to the change in the user’s eye position with respect to a portion of the visual stimuli – as such, the Examiner must show that the cited references disclose **both** conditions, not that a visual event can be created upon the independent occurrence of **either** condition) by citing to different, unrelated parts of a reference that do not teach the entire claim limitation. By analogy, if a claim limitation recited “generating a start signal if a first input and a second input are received,” it would be improper to first misconstrue the claim limitation to read “generating a stop signal if a first input is received,” and then to cite to a first part of a reference that states that the stop signal is generated if a first input is received, and then to cited to a second part of the reference the is unrelated to the first part that discloses that a start signal can be generated if a second input is received, yet that is exactly what the Examiner has done. If a reference or combination of references do not disclose each of the claim limitations, then a prima facie case for rejection of the claims under 35 U.S.C. 103(a) has not been made. It is simply improper to

misconstrue the claims and then to break them up into separate components when the explicit claim language prevents that, in order to read the claims on the prior art.

Accordingly, the rejection of claims 1-15 and 19-21 should be REVERSED.

## APPENDIX OF CLAIMS (37 C.F.R. § 41.37(c)(8))

The text of the claims involved in the appeal are as follows:

1. A system that enables a reconstructing of user-viewable visual stimuli comprising:

a processing platform for: executing code capable of recording a user-viewable visual stimuli, verifying a change in the visual stimuli without requiring user specified information as an input, and creating a visual event as a result of a browser event that causes a change in the visual stimuli; and

a storage platform for storing at least the visual stimuli, wherein the storage platform is operably coupled to the processing platform;

wherein the processing platform is adapted to reconstruct at least one of:

the visual stimuli; and

the change in the visual stimuli, at a specific time that a user viewed the visual stimuli.

2. The system of claim 1 further comprising a user interaction device coupled to the processing platform.

3. The system of claim 1 wherein the processing platform executes code capable of recording a user-viewable stimuli, by:

detecting a visual event;

verifying that the visual event involves a parameter that changes a viewable stimuli; and

recording at least one parameter.

4. The system of claim 1 further comprising a browser coupled to the processing platform.

5. The system of claim 1 further comprising a browser interface coupled to the processing platform.
6. The system of claim 1 further comprising a network coupled to the processing platform.
7. The system of claim 1 wherein the storage platform comprises cached memory.
8. The system of claim 1 wherein the system is maintained in a Person Digital Assistant (PDA).
9. The system of claim 6 wherein the network is the internet.
10. The system of claim 6 further comprising a host computer coupled to the network, the host computer for communicating with the processing platform.
11. The system of claim 1 further comprising an eye-tracking device coupled to the processing platform.
12. The system of claim 11 wherein the eye-tracking device is enabled to monitor pupil dilation.
13. A system that enables a reconstructing of user-viewable visual stimuli comprising:  
  
a processing platform for: executing code capable of recording a user-viewable visual stimuli, verifying a change in the visual stimuli, verifying a change in a user's eye position, and creating a visual event as a result of a browser event that causes the change in the visual stimuli and to the change in the user's eye position with respect to a portion of the visual stimuli; and

a storage platform for storing at least the visual stimuli, wherein the storage platform is operably coupled to the processing platform;

wherein the processing platform is adapted to visually reconstruct and display the change in the visual stimuli in association with the change in the user's eye position with respect to a portion of the visual stimuli, at a specific time that a user viewed the visual stimuli.

14. The system of claim 13 further comprising a parameter related to the visual event, wherein the parameter is a network address of all online content immediately displayed within a browser window.

15. The system of claim 13 further comprising a parameter related to the visual event, wherein the parameter is a two-dimensional offset of the online content as it is displayed within a browser window.

18. The system of claim 1, wherein the change is caused by a user.

19. The system of claim 1, wherein the change is caused by a source of the visual stimuli.

20. The system of claim 1, wherein the change is caused by the processing platform.

21. A computer readable medium comprising instructions for:

correlating an eye position with a portion of the displayed visual stimuli;

verifying a change in the displayed visual stimuli resulting from a browser event that causes the change;

verifying a change in the eye position based on the change in the displayed visual stimuli;  
and

reconstructing the change in the displayed visual stimuli and the change in the eye position, at a specific time that a user viewed at least one of:

the displayed visual stimuli at an eye position;

the change in the displayed visual stimuli;

the change in the eye position; and

the change in the eye position based on the change in the displayed visual stimuli.

# **VIII. EVIDENCE APPENDIX (37 C.F.R. 41.37(c)(9))**

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**IX. RELATED PROCEEDINGS APPENDIX (37 C.F.R. 41.37(c)(10))**

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If any applicable fee or refund has been overlooked, the Commissioner is hereby authorized to charge any fee or credit any refund to the deposit account of Jackson Walker, LLP, No. 10-0096.

Respectfully submitted,

By: 

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Dated: June 12, 2007

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